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No. 08-483

In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
*Petitioner*,

*v.*

THE NEW YORK TIMES COMPANY,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether summary judgment was properly entered in this defamation action on the ground that the plaintiff is a limited-purpose public figure who failed to produce sufficient evidence from which a reasonable jury could find "actual malice" by the requisite clear and convincing evidence.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) and Rule 29.6 of the Rules of the Supreme Court of the United States, the following are parties to the proceeding below:

The New York Times Company, appellee below and respondent here, is a publicly traded company and has no affiliates or subsidiaries that are publicly owned, and no publicly held company owns more than 10% of its stock.

Steven J. Hatfill, appellant below and petitioner here, is an individual.

Nicholas Kristof, an individual, was dismissed as a defendant in the case by the district court pursuant to a stipulated order, and he is not a party to this proceeding.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i
PARTIES TO THE PROCEEDING ..... ii
TABLE OF AUTHORITIES ..... iv
STATEMENT OF THE CASE ..... 1
A. Hatfill and Bioterrorism ..... 1
B. Hatfill and the Attacks ..... 7
C. Hatfill and the Investigation ..... 9
D. Kristof's Columns ..... 14
REASONS FOR DENYING THE PETITION ..... 20
I. "Limited Purpose" Public Figure ..... 20
II. Constitutional Malice ..... 28
CONCLUSION ..... 38

## TABLE OF AUTHORITIES

### CASES

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 35

*Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) ..... 36

*Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) ..... 32

*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) ..... 7

*Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (4th Cir. 1982) ..... 23

*Foretich v. Capital Cities/ABC*, 37 F.3d 1541 (4th Cir. 1994) ..... 23, 24

*Garrison v. Louisiana*, 379 U.S. 64 (1964) ..... 37

*Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970) ..... 22

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ..... *passim*

*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) ..... 33

*Hutchinson v. Proxmire*, 443 U.S. 111 (1979) ..... 26

*Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984) ..... 23, 24

*Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003) ..... 28

*Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) ..... 23, 24

*Maryland Highways Contractors Association v. Maryland*, 933 F.2d 1246 (4th Cir. 1991) ..... 35

*O'Donnell v. CBS Inc.*, 782 F.2d 1414 (7th Cir. 1986) ..... 28

*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) ..... 34, 36

*Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991) ..... 23

*Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980) ..... 29

*Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003) ..... 35

*St. Amant v. Thompson*, 390 U.S. 727 (1968) ..... 29, 30, 32, 33

*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ..... 32

*Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) ..... 28

*Veilleux v. NBC*, 8 F. Supp. 2d 23 (D. Me. 1998) ..... 32

*Waldbaum v. Fairchild Publications, Inc.*,
627 F.2d 1287 (D.C. Cir. 1980) ..... 21, 22, 24

*Wayment v. Clear Channel Broadcasting, Inc.*,
116 P.3d 271 (Utah 2005) ..... 24

*Wolston v. Reader's Digest Association*,
443 U.S. 157 (1979) ..... 26

**STATUTES, CODES AND RULES**

FED. R. CIV. P. 56(e) ..... 35

4TH CIR. R. 30(C) ..... 7

S. CT. R. 15.2 ..... 1, 20

VA. CODE § 8.01-247.1 ..... 15

**TREATISES**

1 ROBERT D. SACK, SACK ON DEFAMATION – LIBEL, SLANDER & RELATED PROBLEMS § 5.3.3 (3d ed. 2006) ..... 24

**OTHER MATERIALS**

Alan Stang, *Frame Up: Richard Nuccio and the War on Police*, AMERICAN OPINION 1 (April 1969) ..... 22

The Petition should be denied because it (1) misrepresents the record evidence, *see* S. Ct. R. 15.2, (2) misstates the Fourth Circuit's holdings, and (3) posits nonexistent conflicts between those holdings and the decisions of this and other courts.

## STATEMENT OF THE CASE

Shortly after September 11, 2001, anthrax-laced letters killed five people, generating intense public concern about who was responsible and whether further such attacks were forthcoming. J.A.255. The mailings reinvigorated a national debate about our vulnerability to bioterrorism and ability to prevent another attack. J.A.342-403.

### A. Hatfill and Bioterrorism

Petitioner Steven Hatfill was an active participant in this debate long before the attacks, and his participation continued thereafter. He had for years publicly advocated his views that our government was ill-prepared to respond to bioterrorism, that knowledgeable scientists (including himself) could easily weaponize biological agents such as anthrax, and that the 2001 attack was the work of foreign terrorists.

Hatfill emerged on the national scene in 1996, following his return from two decades abroad, where he served in the Rhodesian military while pursuing degrees there and in South Africa. J.A.507-13. In 1996, he won a fellowship at the National Institutes of Health by submitting a résumé falsely claiming a Ph.D. along with a forged diploma. J.A.513-15,563-66,569. In 1997, he received another fellowship – also based on his false claim of a Ph.D. – to work full-

time at the United States Army Medical Research Institute of Infectious Diseases ("USAMRIID") at Fort Detrick. J.A.515-18,607,614-15. Employed there until September 1999, Hatfill was cleared to work with Biosafety Level 3 pathogens, which include anthrax. J.A.449,615,633-37.

The Ames strain of anthrax used in the attacks was present at USAMRIID. Throughout the period Hatfill was employed there, anthrax studies were conducted in the buildings where he worked. J.A.596-98,617-24,627-30. Anyone who had access to certain biocontainment areas, as Hatfill did, had access to anthrax spores. J.A.589-90,594-95,599-602,625-37. Hatfill was one of about 100 people with authorized access to an unlocked closet, located down the hall from one of his laboratories, where Ames strain anthrax was kept. *Id.* The spores were in a "wet" form and constituted "seed" from which "dry" anthrax powder could be produced. J.A.596-97,758-68,1602-09.[1]

At USAMRIID, Hatfill became, in his words, "increasingly aware of the potential public health risk caused by the release of a virulent virus in a densely populated area." J.A.514. The more he learned about "[s]everal anthrax hoaxes . . . described in the media," the "more alarmed [he] became about this potential threat." *Id.* As a result,

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[1] The Petition's representation that Hatfill had no "access" to "secure facilities in which [anthrax] was *studied*," Pet.3 (emphasis added), is carefully crafted to conceal the undisputed fact that he had access to the facility, and the specific cabinet, in which anthrax was *kept*.

Hatfill "worked tirelessly to raise awareness of the bioterrorism and bioweapons threats," J.A.1570, and became known for his warnings that the U.S. was under-prepared. J.A.514-20,572-87,593,603-05,1736. His own press spokesman asserted Hatfill was "very concerned for a long time that the United States [wa]s not doing enough to protect itself against the possibility of biological terrorism[,] and he spoke about it. He was kind of a whistleblower of sorts in government on the issue." J.A.1736.

To promote his views, Hatfill gave multiple public speeches. J.A.326-39,514-20,682-92. During one appearance, he demonstrated "how easy it would be for a terrorist to culture infectious disease organisms using only low technology methods dating from the 1800's." J.A.515. Hatfill engaged the popular press as well, appearing, for example, on CBS Radio as a "guest-expert" and giving an interview to a *Washington Times* columnist. J.A.283-84,572,579. In the resulting column, Hatfill hypothesized scenarios for a bioterrorist attack, including the release of anthrax into a public building's ventilation system. J.A.283-84. Later, he gave an interview to *Insight* magazine, during which he theorized that unidentified fumes detected at airports "could be a form of testing for a possible future bioterrorist attack – perhaps next time using anthrax." J.A.285-86. Described as "a specialist in bioterrorism management," Hatfill again discussed the release of a pathogen in a public building. *Id.* For another article, Hatfill posed for a photograph in which he demonstrated "how a determined terrorist could cook up a batch of plague in his or her own kitchen using

common household ingredients." J.A.287-89,2070. He was identified by multiple publications internationally as someone who could culture pathogens at home. J.A.290-309.

Following a 1997 anthrax hoax at B'nai B'rith headquarters in Washington, Hatfill contacted nationally syndicated radio and television shows, offering himself as a guest. J.A.310-13,579. On one program, he was an "audience favorite" who discussed "how anthrax can be sent in the mail." J.A.314-15. Shortly after the B'nai B'rith hoax, Hatfill wrote to organizers of a conference on "Super Terrorism," offering himself as a speaker on this "vital" national security issue because he was "tremendously interested in becoming more involved in this area." J.A.282. Hatfill also appeared on the Voice of America radio network, Radio America, and Canadian television, and another interview of him was included in a book about bio-weapons. J.A.321-25,579,664.

Hatfill also pursued other public-speaking engagements, including a lecture entitled "Building a Biobomb" at the Council on Foreign Relations and a presentation attended by the press on "Emerging Threats of Biological Terrorism." J.A.326-39,514-16,682-92. During at least one of his public appearances, Hatfill hypothesized a bioterror attack at the White House. J.A.515-16. Hatfill registered with the Copyright Office a novel detailing a bioterrorist plot against government officials. J.A.316-20.

In August 1998, Hatfill spoke at the Defense Department's Worldwide Conference on Antiterrorism, alongside William Patrick, the nation's foremost expert on anthrax production. J.A.653. Hatfill cultivated a relationship with Patrick and boasted that Patrick had shared with him "a lot of technical knowledge about bioweapons and bioweaponeering." J.A.591-92,641,649-50,704-05,708,723-30,732-34,744.

In January 1999, Hatfill was hired by Science Applications International Corporation ("SAIC"), a prominent government contractor. Hatfill's SAIC supervisors valued his "extensive network of contacts within the Department of Defense, the special operations community, and the Central Intelligence Agency" and viewed his expertise in biological weapons as a "valuable asset." J.A.789-90,805,885. SAIC touted Hatfill to potential clients as someone with a "thorough working knowledge of offensive biological warfare" gained "under the tutelage of William C. Patrick." J.A.723.

At SAIC, Hatfill wrote several papers and gave many presentations on these topics. One paper about the government's response to anthrax hoaxes bemoaned its "complete misunderstanding about dry powder agents." J.A.905-15. Another, co-authored with Patrick, described a bio-weapons laboratory in a single room that "feature[s] all the necessary equipment for bacterial BW agent scale-up fermentation and processing" and contained a section on anthrax. J.A.1459,1486-89.

While at SAIC, Hatfill attended classified briefings during which Patrick "described in detail processes for producing powdered anthrax" and Hatfill delivered at least one such briefing in Patrick's stead, a presentation described as "[e]xtremely detailed." J.A.707,709-12,735-37,753-73,960,966-1330. Hatfill also commissioned a study by Patrick concerning the risk of anthrax sent through the mail, which detailed the characteristics of weaponized dry anthrax. J.A.1534-65.

Hatfill held himself out to SAIC, the government, and the public as someone who possessed significant expertise concerning biological agents, including anthrax. His résumé touted his "working knowledge . . . of wet and dry BW agents," and his colleagues believed he was "highly knowledgeable about biological weapons and agents," including anthrax. J.A.639-40,642,651-52,657,733-34,738-43,799-802,810-11,814,956-58. In 2001, Hatfill submitted to his college alumni magazine an article describing himself as "a specialist in biological warfare and its defense," along with a photograph depicting him in a bio-safety suit. J.A.533-34,1374-75. Government agencies sought Hatfill's advice on biodefense projects because he was, according to a Pentagon official, the "ultimate biological weapons expert." J.A.1572-74.

In August 2001, weeks before the first anthrax mailing, the government suspended Hatfill's security clearance because "there is a reasonable basis for concluding that [his] continued access to classified information poses an imminent threat to the

national interest." J.A.1575-76. The suspension came after Hatfill failed four sessions of CIA polygraphs "based on the issue of foreign influence" and his "apparent lack of candor." J.A.1577-78,1586-88.

**B. Hatfill and the Attacks**

Following the attacks, the press sought out Hatfill for his self-proclaimed expertise about the mailings and his views about likely perpetrators. J.A.665,1610-11,1673,1677-81. In October 2001, *The Washington Times* republished the 1997 column featuring Hatfill's discussion about releasing anthrax in public buildings. J.A.255,340-41. Then, accompanied by "a colleague from the U.S. State Department," Hatfill was interviewed by an ABC reporter, "tried to explain how difficult it was to make anthrax," and advocated the position that the attacks were not of "domestic" origin." J.A.665.[2]

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[2] The Petition attempts to explain away this undisputed evidence by asserting that "ABC News sought out Hatfill in an unsuccessful attempt to get him to agree to an interview so that they could confront him." Pet.5. This assertion is unaccompanied by any citation, and for good reason – there is no record evidence to support it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (Court may not rely on evidence "'not in the record of the proceedings below'"). In the Fourth Circuit, Hatfill attempted to supplement the record with material neither generated during discovery nor otherwise in evidence in the district court. Not only did the Fourth Circuit *deny* that motion, *see* Order (7/19/07); 4TH CIR. R. 30(c), but the proffered evidence revealed that Hatfill freely offered his views to ABC that the attack "was all Saddam Hussein and Iraq and he could prove it" *and* discussed becoming an ABC "news consultant." Motion Opp'n (7/13/07) at 4-5.

In October 2001, Hatfill and several others visited a forty-acre property in rural Virginia. J.A.559-62,1380-87,1612-28,1630-39,1643. The property includes a three-bedroom house and guest cabin, which are not visible to passersby. *Id.* While there, Hatfill "answer[ed] questions about the ability to process anthrax," and the group discussed Cipro and whether Hatfill could provide it. J.A.1635-36,1641-42. Hatfill had been to the property at least a dozen times. J.A.694-703,1617-18.

Hatfill began taking Cipro in early September 2001, before the first mailing, and did so through November. J.A.542-58,1644-50. Although he is not licensed to practice medicine in the U.S., Hatfill dispensed Cipro to at least four people in late 2001. J.A.538-39,713-18,1653,1655. In addition to giving it "to people who have visited [him]," J.A.953, Hatfill dispensed Cipro from a stock kept in the trunk of his car. J.A.745-47.

After the attacks, Hatfill told a colleague he could make dry anthrax of the same type without access to a substantial laboratory "because I know what I'm doing." J.A.1602-09.[3] In May 2002, SAIC held a "Weapons of Mass Destruction Conference" in Washington and publicized Hatfill's appearance there as a featured speaker. J.A.1670-71.

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[3] "Wet" anthrax can be safely dried on a small scale and a skilled person can handle it in a home laboratory with an over-the-counter mask and antibiotics. J.A.749-52.

### C. Hatfill and the Investigation

Shortly after the attacks, the FBI released a profile indicating the perpetrator had a scientific background, took steps to protect his safety through vaccine or antibiotics, and had access to anthrax and expertise in refining it. J.A.208-11. Working from the profile, the FBI developed a list of people who could have committed the attacks and investigated these "persons of interest." J.A.213C-214. The FBI identified Hatfill as such a person and interviewed him in December 2001. J.A.215. In January 2002, Hatfill took an FBI-administered polygraph, which "involved more than one test sequence." J.A.1656. He concedes he took "at least" one polygraph and FBI records reference the "results of" a "second polygraph." J.A.224,954.

Early in 2002, the FBI asked the American Society for Microbiology for help in finding the perpetrator, described as a "single person" who "has or had legitimate access to select biological agents at some time." J.A.237-38. The FBI asserted "[i]t is very likely that one or more of you know this individual" and invited scientists to bring "all relevant information, no matter how insignificant it may seem . . . to the attention of the investigators." *Id.*

Barbara Rosenberg, a molecular biologist who headed a working group on bio-weapons for the Federation of American Scientists, developed a similar profile. J.A.345-59. She posted it on the Federation's website and gave presentations about it at Princeton's Woodrow Wilson School and at the

Biological Weapons Convention in Geneva. J.A.256-58. Following the attacks, she was frequently quoted in the press as a bio-weapons expert. *Id.* In June 2002, with the FBI present, Rosenberg briefed the staffs of two senators who received anthrax-laced letters and "made clear . . . that her suspicions rested on Dr. Hatfill as the person most likely responsible for the mailings." J.A.151-52.

By early 2002, press reports began to focus on Hatfill, without identifying him by name. J.A.258-59. Those reports included a February 19 article in the Newark *Star-Ledger*, which drew "a likely portrait of the perpetrator as a former Fort Detrick scientist who is now working for a contractor in the Washington, D.C. area." J.A.395. An article in *The Washington Times* on February 25 described the FBI's prime suspect as a "former scientist" at USAMRIID who "is now employed as a contractor in the Washington area," and a March 2002 article in *The New Yorker* hypothesized that the perpetrator was a "a middle-aged man who had worked at [USAMRIID] . . . was familiar with the method of weaponizing anthrax devised by William Patrick . . . [and] now works for a Washington-area subcontractor to the U.S. biological-weapons program." J.A.374-75,400-01. In March, Hatfill received an email from a medical school classmate, who reported that Hatfill had "becom[e] quite the celebrity recently" and that the classmate had been "'plagued' by [South African television] and the Baltimore Sun regarding [Hatfill's] alleged

involvement with that large anthrax outbreak in Zimbabwe." J.A.1682.[4]

During this period, Hatfill continued to engage the press. For example, Baltimore *Sun* reporter Scott Shane contacted Hatfill twice in February 2002 because he "had presented himself to the world as a biodefense expert," and Shane "was talking to all the bioterrorism experts that [he] could about the case," and also because Shane "had been told that [Hatfill] . . . was among the scientists and others who had been questioned by the FBI." J.A.1673. In February 2002, *The Sun* published an article quoting Hatfill (though not by name). J.A.398,530-32,1677-81.

On June 25, 2002, the FBI searched Hatfill's apartment. The search was televised live and generated massive news coverage. J.A.152-53. Contrary to the Petition's representation that "nothing incriminating was found," Pet.7, the FBI seized "notes re: anthrax, milling and munitions," a "notebook w/ handwritten notes re: dissemination and Pentagon, WTC, White House and Congress,"

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[4] The Petition's most significant misrepresentation may be its stated premise that the "[w]hen The Times began publishing Kristof's articles, Hatfill was a virtual unknown. But Kristof made Hatfill infamous." Pet.1.; *see also* Pet.2 (asserting Hatfill's "virtual anonymity at the time of the attacks"). In fact, Hatfill had become a central figure in the investigation, and in press reports about it, long before Kristof first wrote about "Mr. Z" in July 2002 or discussed him (albeit not by name) that May. Indeed, at his first press conference in August, Hatfill blamed his predicament on Rosenberg, the FBI, and *other* news organizations and journalists, *not* including either Kristof or the Times. J.A.1717-21.

and a spinner flask of anthrax simulant. J.A.1686-87. Hatfill has characterized the press coverage that followed as a "media frenzy." J.A.526.

For example, before the first column at issue was published on July 2, 2002, *The Sun* had identified Hatfill by name and reported, *inter alia*, that he had the necessary skills and access to anthrax to have carried out the attacks and had "spoken frequently on the bioterrorist threat, stressing how easy it would be for a terrorist to brew a deadly bioagent in his kitchen." J.A.413-15. The Hartford *Courant* published an extensive article identifying Hatfill on June 26. J.A.419-22. The following day, it reported that government "scrutiny of Hatfill appears to be intensifying." J.A.423-26.

On August 1, 2002, the FBI searched Hatfill's car and apartment and his girlfriend's condominium. J.A.215. Once again, the media covered these searches. J.A.157-58. The FBI seized a container of Cipro hidden within a coffee jar in Hatfill's girlfriend's apartment, and told her that it had "conclusive evidence" from specially trained bloodhounds that Hatfill had killed five people. J.A.241B-C,243-44,1699,1703. [5]

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[5] The Petition contends that Kristof recklessly reported that "'[s]pecially trained' bloodhounds" had "'responded strongly' to Hatfill," even though another journalist had "debunked the 'bloodhound evidence'" five days earlier. Pet.29. First, it is undisputed that the FBI *did* widely disclose the bloodhound information. J.A.172-73,186-87,241B-C,243-44. Second, the FBI's information had already been prominently reported in *Newsweek* and repeated in multiple newspapers and on national television well before Kristof's column. Third, the

Throughout this period, Hatfill had several additional meetings with reporters, including dinner with then-Times reporter Judith Miller, lunch with Ted Koppel, and lunch with Jim Stewart of CBS News. J.A.665-66. He gave formal interviews to two other reporters and attended "meetings" with journalists from *The Washington Post*, National Public Radio, *The Los Angeles Times*, NBC News, United Press International, and *The Washington Times*. J.A.666.

On August 6, 2002, Attorney General Ashcroft announced on national television that Hatfill was a "person of interest." J.A.161,246-46B. On August 11 and 25, 2002, Hatfill held widely publicized press conferences to protest his innocence. J.A.261-63,1701-21. Thereafter, he filed a lawsuit against the federal government, alleging that his reputation was irretrievably damaged because the FBI disseminated to the press information from government files indicative of his guilt, including the facts that he "possesse[d] the expertise to handle deadly pathogens," "had access to the Ames strain of anthrax at Fort Detrick," "had received prescriptions for Cipro," and had "failed polygraphs." J.A.156,165,168,171,247-49.

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"bloodhound evidence" had not been "debunked" – the referenced article purports only to report "doubts about the significance" of the information, J.A.436-41, and the press continued to report the FBI's claims thereafter, J.A.184-90. Fourth, Kristof's passing reference to bloodhounds expressly diminished their significance as "obscure." J.A.436-41.

On June 27, 2008, the government agreed to pay Hatfill more than $5.8 million in settlement of his claims. On August 6, the FBI announced that Dr. Bruce Ivins, another scientist employed at USAMRIID who had taken his own life on July 29, had sent the anthrax letters. On August 8, the government publicly exonerated Hatfill.

**D. Kristof's Columns**

Kristof is a columnist. His work appears on the "Op-Ed" page, opposite the newspaper's editorials. He received his second Pulitzer Prize in 2006, for what the Pulitzer Committee described as "graphic, deeply reported columns that, at personal risk, focused attention on genocide in Darfur and . . . gave voice to the voiceless in other parts of the world." J.A.250-51, 263,280-81.

In late 2001, Kristof came to believe that bioterrorism constituted a significant, ongoing threat to the United States and that apprehending the anthrax mailer was vitally important to our national security. As the investigation dragged on, Kristof became increasingly concerned the FBI was not doing all it should.[6] He wrote a series of columns on

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[6] The Petition begins by quoting a January 2002 column in which Kristof stated, "'I think I know who sent out the anthrax,'" Pet.1 (quoting App.66a), but neglects to disclose that the column addresses only Kristof's belief that the mailer was more likely an American scientist than a foreign terrorist, as was widely assumed at the time, and *disclaims* any knowledge of the specific perpetrator's identity.

the subject. J.A.264-65. Four of them, published in July and August 2002, are at issue.[7]

The theme of the first column, published July 2, was that the FBI's failure to find the perpetrator "continues to threaten America's national security." The column criticized the FBI for its "lackadaisical" attitude and cited several examples, including that the bureau permitted stocks of anthrax to be destroyed before they had been genetically analyzed, delayed review of anthrax strains stored at various labs, and failed to "systematically polygraph scientists" at two labs where anthrax was stored. In this context, the column held up the FBI's probe of an otherwise unidentified "Mr. Z" as another example of the investigation's shortcomings. Specifically, Kristof noted that, "[s]ome in the bio-defense community" thought Mr. Z was "a likely culprit," and chastised the FBI for failing to investigate him thoroughly. Nevertheless, the column emphasized that Mr. Z "denie[d] any wrong-doing," and that his friends were "heartsick at suspicions directed against a man they regard as a

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[7] Much of the "evidence" cited in the Petition relates to a May 2002 column published more than a year before Hatfill initiated this litigation in state court. His initial pleading contains no reference to the May column and affirmatively alleges that Hatfill's claims are directed only to columns published "[b]eginning July, 2002." J.A.2033-34. Hatfill undoubtedly framed his pleading in this manner because he recognized that any claims arising from the May column were already time-barred when it was filed and could not later be resuscitated when he voluntarily dismissed his state court action and re-filed it in federal court. VA. CODE §8.01-247.1.

patriot." The column urged the FBI either to "go after [Mr. Z] more aggressively" or "exculpate him and remove this cloud of suspicion." It asserted that deficiencies in the investigation of Mr. Z were "part of a larger pattern" of government inattention to the bioterrorism threat. J.A.275-76,406.

The second column, published July 12, again criticized what Kristof termed the FBI's "unbelievably lethargic" investigation. The column described earlier anthrax hoaxes the FBI had ignored and criticized the bureau for not investigating letters sent to media organizations in 1999. Kristof briefly referred to "Mr. Z," noting that he made public comments about the B'nai B'rith hoax. The column identified Mr. Z as a "bio-defense insider" and someone who "intrigues investigators" but who "denies any involvement with the anthrax attacks." J.A.276,407.

On July 19, Kristof's column criticized lax security at bio-weapons facilities and inadequate management of pathogens in the U.S. bio-defense program. Kristof described instances in which Ebola and other pathogens had gone missing from U.S. labs and urged Congress to investigate. He noted in passing that his interest in bio-security had been piqued by his research into the still-unidentified Mr. Z, who had been hired to work on deadly viruses at USAMRIID despite having "spent years in the armed forces of Rhodesia and apartheid South Africa." The column noted that Mr. Z had been "interviewed four times by the FBI" and had his home "searched twice in connection with the anthrax investigation," but

emphasized that USAMRIID personnel "are dedicated patriots who could earn more in the private sector" and "risk their lives working with deadly germs to improve vaccines for American troops." J.A.276-77,408.

The final column was published August 13, after the Attorney General publicly identified Hatfill and he held his first press conference. It began by disclosing that "Mr. Z" was Hatfill, who "over the weekend" had "named himself." Kristof underscored the importance of not jumping to conclusions about Hatfill, warning "[i]t must be a genuine assumption that he is an innocent man caught in a nightmare" and that "[t]here is not a shred of traditional physical evidence linking him to the attacks." Nevertheless, the column defended what Kristof considered the FBI's legitimate interest in investigating Hatfill, given "his expertise in dry biological warfare agents," his access to labs "where anthrax spores were kept," and the animus he had shown "to some federal agencies." Even so, Kristof emphasized his hope that "the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him." In Kristof's view, the FBI's investigation of Hatfill raised two "larger issues" – the bureau's "initial slowness in carrying out the anthrax investigation" and "the need for much greater care within the U.S. bio-defense program." J.A.277,409.

In researching these columns, Kristof reviewed many previously published news reports. These reports recounted that Hatfill had been questioned

by the FBI more than once; had been vaccinated against anthrax; had taken Cipro; had access to labs where it was stored; had knowledge about anthrax's use as a weapon; had strong views about the bioterrorism threat; had agreed that "his background naturally drew the FBI's attention;" had spoken frequently about possible bio-terror events; had access to a "remote location;" and lost his security clearance after he failed a polygraph. J.A.265-69,410-35.

Kristof also reviewed hundreds of pages of documents. Among them were several versions of Hatfill's résumé, which touted his "[w]orking knowledge of the former U.S. and foreign BW programs, wet and dry BW agents" and boasted that he had "clearance to conduct research on Biosafety Level 3 pathogens (Plague, Anthrax and Monkeypox)." These representations indicated to Kristof that Hatfill had expertise in handling pathogens, including anthrax. J.A.269-70,447-73.

In addition, Kristof reviewed the letter Hatfill had sent to organizers of the "Super Terrorism" conference and the text of the presentation he gave on "Emerging Threats of Biological Terrorism." Kristof read the report Hatfill had commissioned from Patrick describing anthrax sent through the mail and detailing the characteristics of weaponized dry anthrax. These documents further contributed to Kristof's understanding that Hatfill was an expert in bio-weapons, including anthrax. J.A.270,282,474-503.

Kristof also consulted dozens of sources, including microbiologists, bio-defense experts, and Hatfill's friends and co-workers. J.A.270. None expressed any doubt that Hatfill had substantial experience with bio-weapons, particularly anthrax. J.A.274. For example, Dr. Richard Ebright, a microbiologist with multiple degrees from Harvard University, J.A.271-72, told Kristof that, "[b]ased upon information in [Hatfill's] C.V., as well as the record of his publications," he believed Hatfill "did have the means to prepare bacterial culture and to dry bacterial culture" and "to prepare a highly aerosolized dried powder." J.A.1734. Kristof also reviewed materials written and compiled by Rosenberg which indicated that the person she had focused on (who Kristof knew to be Hatfill) had "the right skills, experience with anthrax, up-to-date anthrax vaccination, forensic training, and access to USAMRIID and its biological agents through 2001" as well as "access to a conveniently-located but remote location." J.A.270-71,345-59. Through her writings and their telephone conversations, Kristof learned that Hatfill had the ability to make anthrax, access to anthrax spores, a possible motive for the attacks, access to a "remote location," and that he gave Cipro to people who visited him. J.A.271.[8]

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[8] The Petition asserts that Rosenberg's testimony about what she told Kristof "'contradicts'" his own. Pet.28. The otherwise unexplained "contradiction" is, however, another misstatement of the evidence. Specifically, Hatfill asserted below that Rosenberg "denied *telling* Kristof that Hatfill could make first-rate anthrax." Reply Br.39 (emphasis added). Rosenberg actually testified that, although she did not recall

Hatfill's friends told Kristof they did not believe he was the mailer, and their sentiments were included in the columns. But not even they suggested that Hatfill was anything other than a gifted bio-weapons researcher with expertise in anthrax. J.A.274.

## REASONS FOR DENYING THE PETITION

### I. "Limited Purpose" Public Figure

The Petition asserts that the Fourth Circuit found Hatfill to be a "limited purpose" public figure without identifying the "particular" public controversy that gave rise to the defamation, as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), and instead applied a standard that conflicts with *Gertz* and with the decisions of several circuits.[9] These contentions constitute a plain misstatement of the Fourth Circuit's decision, the relevant post-*Gertz* case law, and the record evidence.

*First,* the Fourth Circuit did not, as the Petition asserts, set aside this Court's requirement that a limited-purpose public figure voluntarily participate in the "particular" public controversy that gave rise to the defamation at issue. *Gertz*, 418 U.S. at 345.

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making such a statement to Kristof "orally," she was confident he had learned precisely that information from "something [she] wrote" and to which she had referred him. J.A.1764.

[9] The district court also found that Hatfill was a public official. *See* App.40a-41a. The Fourth Circuit did not reach this issue, *see* App.11a, which provides an alternative basis for affirming the Fourth Circuit's decision, *see* S. CT. R. 15.2.

*See* Pet.i (question presented is "[w]hether the court of appeals erred by declining to identify the 'particular controversy giving rise to the defamation'"). The Fourth Circuit actually began its analysis by citing to and embracing the operative language in *Gertz*:

> [I]n contrast to a public official or an all-purpose public figure, either of whom must always meet the actual malice standard, a "limited-purpose public figure," one who has "thrust [himself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345 (emphasis added), must show actual malice only when alleging defamation with regard to the particular controversy into which he has inserted himself.

App.10a. The Fourth Circuit then "address[ed] the nature of the 'particular public controversy' that gave rise to the alleged defamation to determine whether Dr. Hatfill thrust himself into *that* controversy." App.19a (citing *Gertz*, 418 U.S. at 345).[10] It did not, in words or substance, purport to "look[] broadly at *every* issue raised by the articles in which the

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[10] The Petition cites no case, because there is none, that purports to put the weight on this Court's use of the word "particular" in *Gertz* that the Petition asserts it should bear. *See, e.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (distinguishing between those "persons who are public figures for all purposes and those who are public figures for *particular* public controversies") (emphasis added).

defamation happened to appear" and then "examine[] whether the plaintiff voluntarily participated in debate on any such issue." Pet.14.[11]

*Second*, the Fourth Circuit's decision in no sense conflicts with the law of any other circuit. There is no suggestion in either *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), or in decisions of other circuits, that they have parted company with the Fourth Circuit in construing the *Gertz* standard in this context. Similarly, there is no suggestion in the Fourth Circuit's opinion that it is taking or has previously taken a different route to identifying limited purpose public figures than the D.C. Circuit did in *Waldbaum*. To the contrary, the Fourth Circuit has consistently endorsed the D.C.

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[11] The Petition's assertion that the Fourth Circuit's "approach is irreconcilable with *Gertz*," is also based on its false *assumption* that the disputed article in *Gertz* "surely included, for example, discussion of the perceived threat from communism generally" which, according to the Petition, rendered it significant that this Court did not assess whether "Gertz ever spoke or wrote on communism." Pet.14-15. The article at issue in *Gertz* did not address "the perceived threat from communism generally"– it focused tightly on the shooting of a "hoodlum" by a decorated police officer and his subsequent conviction, ostensibly as a result of a communist-inspired war on local police. *See* Alan Stang, *Frame Up: Richard Nuccio and the War on Police*, AMERICAN OPINION 1 (April 1969). As this Court noted, *see Gertz*, 418 U.S. at 352, there was no evidence that, beyond his legal representation of the victim's family, Gertz had taken any public position with respect to the case specifically, or the broader issue of the alleged "conspiratorial war being waged by the Communists against the police in general." *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

Circuit's "two-part inquiry for determining whether a defamation plaintiff is a limited-purpose public figure. First, was there a particular '*public* controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1553 (4th Cir. 1994) (citations omitted); *id.* at 1554 (citing *Waldbaum*); *see Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 669 (4th Cir. 1982) (same); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991) (same).[12] The Fourth Circuit has *not*, in this or any other case, purported to dispense with the requirement that, in determining whether a plaintiff is a limited purpose public figure, a court must first "address the nature of the 'particular public controversy' that gave rise to the alleged defamation." App.19a (quoting *Gertz*, 418 U.S. at 345).[13]

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[12] To the limited extent it has modified the *Waldbaum* approach, the Fourth Circuit has made it *more* difficult for a plaintiff to become a public figure. *See, e.g.*, *Foretich*, 37 F.3d at 1554 n.11 (explaining Fourth Circuit's comparatively "stringent" approach).

[13] Neither have the Second or Third Circuits. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136 (2d Cir. 1984) ("question in each case is what is 'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation'") (quoting *Gertz*, 418 U.S. at 352); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082-83 (3d Cir. 1985) (explaining that "the alleged libel involves a public controversy," – *i.e.*, "illicit drug activities" – and that it is therefore "necessary to examine the nature and extent of

*Third*, the Petition's disagreement with the Fourth Circuit rests not on any conflict with this or any other court's decisions, but rather with its conclusion that "the particular public controversy" at issue "is the threat from bioterrorism and the nation's preparedness to handle that threat, with the anthrax attacks as the specific example that opened the debate to a greater discussion." App.21a-22a. *See* Pet.12 ("Rather, the controversy was about who committed the 2001 anthrax murders and whether law enforcement authorities were doing enough to apprehend the criminals."). Not only is such disagreement with the application of law to fact an inappropriate basis on which to premise a request for review in this Court, the Petition is demonstrably unreliable in its rendition of the record evidence.

Both courts below recognized that "the controversy into which Plaintiff thrust himself can be properly defined as the government's handling of the bioterrorism threat, and more specifically, its handling of the anthrax investigation." App.44a. These twin controversies are both the express subject

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Marcone's participation in it"). The notion that there is "one 'limited purpose public figure' test that respects this Court's balance and an equally influential one that does not," Pet.24, is pure fiction – neither *Lerman* nor *Marcone* (nor any other cases decided in either circuit) seeks to distance itself from *Waldbaum*. *See Wayment v. Clear Channel Broad., Inc.*, 116 P.3d 271, 282-84 (Utah 2005) (relying interchangeably on *Waldbaum*, *Lerman*, and *Foretich* in evaluating plaintiff's status); 1 ROBERT D. SACK, SACK ON DEFAMATION – LIBEL, SLANDER & RELATED PROBLEMS § 5.3.3 at 5-24 n.147 (3d ed. 2006) (explaining that *every* circuit has adopted similar formulations).

of Kristof's columns and the focus of Hatfill's purposeful activity prior to their publication. Each column took on the "larger issue[]" that Kristof said deserved increased public attention following the mailings: "the need for much greater care within the U.S. biodefense program." J.A.409. Their discussion of the investigation, and Hatfill's role in it, was offered in support of Kristof's thesis that the FBI's "lackadaisical ineptitude in pursuing the anthrax killer *continues* to threaten national security." J.A.406.

The record contains overwhelming, undisputed evidence that Hatfill purposefully injected himself in the larger controversy that gave rise to the defamation – *i.e.*, the adequacy of the government's response to the bioterrorism threat – as well as the narrower controversy he identifies – *i.e.*, who committed the murders. The record overflows with Hatfill's efforts to shine a spotlight on himself and his views about the bioterrorism threat, from multiple appearances in the media, to countless public speeches, to the publication of articles about the subject, to the completion of a novel illustrating his concerns. J.A.282-339,514-20,530-32,572-87,593,603-05,615,617-37,653-92,890-951,1673-75,1677-81,1735-38.[14] And, the Petition's only

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[14] The Petition's assertion that, "[i]n sum, Hatfill's public appearances before the anthrax articles *included* two radio appearances, one non-speaking television appearance, and quotations in two print media articles," Pet.4 (emphasis added), as well as the accompanying discussion, is carefully crafted to obscure the *entirety* of Hatfill's efforts to thrust himself into public debate. *See also* Pet.17 (inaccurately stating that Hatfill

rejoinder to the substantial evidence that Hatfill voluntarily engaged the press on the subject of who committed the attacks long before Kristof's columns is based on inadmissible "evidence" that is nowhere in the record. *See* note 2 *supra*.[15] Hatfill is bound by his *sworn* concession that, in the wake of the attacks, he and "a colleague from the U.S. State Department" set out to persuade ABC "how difficult it was to make anthrax" and that the attacks were not of "domestic origin." J.A.665,1748. Similarly, the Petition cannot wish away Hatfill's statements to *The Sun* following the attacks in his capacity as a bioterrorism expert, J.A.413-15, his publicized appearance as a featured speaker at a May 2002 conference on weapons of mass destruction, or the undisputed evidence of his apparently insatiable appetite for lunches, dinners and other voluntary interactions with reporters following the attacks. J.A.665-66,1670-71.

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"had *one* minor publication in a specialized trade magazine") (emphasis in original).

[15] The Petition incorrectly asserts that the Fourth Circuit's "reliance on Hatfill's contacts with the press after the anthrax attacks" conflicts with *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), ostensibly because "'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.'" Pet.16-17 (quoting *Hutchinson*, 443 U.S. at 135). Lest there be any confusion, well before Kristof wrote the columns at issue or even the time-barred May 2002 column, Hatfill was both the subject of multiple press reports about the attacks and voluntarily offered to the public his views concerning who committed them. *See* pp.7,11 *supra*.

In short, Hatfill's long history – beginning in 1996 and extending at least through early 2002 – of affirmatively courting the public and the media to trumpet his expertise concerning bioterrorism, the threat it posed, and his views concerning the attacks rendered him a public figure with respect to the public controversy engendered by bioterrorism generally and by the September 2001 bioterrorism incident specifically. *See* Pet.6 (conceding Hatfill was so well known that "[m]any readers recognized" him as "Mr. Z" described in columns).[16] Hatfill was not off the mark when he asserted below that the relevant question is "did the plaintiff's participation in a particular public controversy somehow lead to or prompt or cause or invite the defamation?" Reply Br.15. In this case, the answer is undoubtedly "yes" – Hatfill's purposeful conduct, which included showing the world how *he* could whip up a biological weapon in his kitchen and persistently expressing his frustration with the government for not treating more seriously the threat that someone would do so, "prompted," "caused," and "invited" Kristof to question the FBI's failure to subject him to more serious scrutiny in the wake of the attacks.[17]

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[16] Holding that a plaintiff such as Hatfill is a public figure does not, as the Petition repeatedly asserts, leave him or others to be defamed "with impunity." Pet.2,13,24. As the Fourth Circuit recognized, a public figure may secure both compensatory and punitive damages if a defamatory falsehood about him is published with constitutional malice. App.7a,23a.

[17] For the same reason, the putative plaintiff in the Petition's hypothetical would surely be a public figure for purposes of an article reporting that he – an outspoken critic of

## II. Constitutional Malice

The Petition contends that the Fourth Circuit improperly "held" that, unless a defamatory charge is "'completely fabricated,'" a public figure plaintiff cannot establish constitutional malice. Pet.25 (quoting App.25a). This contention is, to borrow a phrase, "completely fabricated," as is the Petition's suggestion that the record evidence would allow a reasonable jury to find constitutional malice with convincing clarity.

The Fourth Circuit's use of the phrase "completely fabricated" follows its accurate recitation of this Court's definition of constitutional malice – *i.e.*, publication of a defamatory statement "'with

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gun control – had shot innocent shoppers, regardless of whether he had ever mounted the public rostrum to advocate random murder and especially if, like Hatfill, he had publicly offered his views about the specific crime of which he was suspected. This would be so regardless of whether the case was litigated in the Fourth Circuit, the D.C. Circuit, or any of the others with which the decision below allegedly conflicts. *E.g.*, *Tavoulareas v. Piro*, 817 F.2d 762, 773-74 (D.C. Cir. 1987) (plaintiff had participated in broad public controversy regarding the general "state of the oil industry," while challenged article addressed allegations he engaged in nepotism); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1277, 1280 (D.C. Cir. 2003) (plaintiff participated in broad public controversy regarding "women in combat," while alleged defamation questioned whether she was "an incompetent combat pilot"); *O'Donnell v. CBS Inc.*, 782 F.2d 1414, 1416-17 (7th Cir. 1986) (cited at Pet.19) (plaintiff participated in broad public controversy regarding "disposal of toxic waste and the EPA's failure to enforce its regulations," while challenged article addressed his firing from position as television executive).

knowledge that it was false or with reckless disregard of whether it was false or not.'" App.7a (citation omitted); *see also id.* ("[t]he standard requires that the defendant have a 'subjective awareness of probable falsity'") (citing *Gertz*, 418 U.S. at 335 n.6; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). The phrase is contained in a paragraph explaining that, although constitutional malice "requires 'much more than a failure to exercise ordinary care,'" there are several *alternative* ways in which a public figure can prove it, including through:

> evidence of the "publication of a *completely* fabricated story, ***or*** of one based entirely on an unverified anonymous telephone call; ***or*** publication where there are obvious reasons to doubt the veracity of the informant."

App.25a (quoting *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980) and citing *St. Amant*, 390 U.S. at 732)) (emphasis in boldface added). The Fourth Circuit's description of the various ways a plaintiff may go about establishing constitutional malice is derived directly from *St. Amant*:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. . . . Professions of good faith will be unlikely to prove persuasive, *for example*, where a story is fabricated by the defendant, is the

> product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732 (emphasis added).

Neither the quoted passage nor any other language in the Fourth Circuit's opinion contains the slightest suggestion that it articulated or applied the "'completely fabricated' rule" described in the Petition. Pet.25-38.[18] Not surprisingly, there is not a single case cited in the Petition that purports either to embrace or reject such a "rule." Nor is there any suggestion in the Fourth Circuit's opinion that it "ignored" or deemed "irrelevant" any admissible evidence proffered by Hatfill, or that it declined to consider the "'cumulative impact'" of such evidence in the "aggregate," much less that it did so because it had adopted a "rule" that only evidence of a "completely fabricated story" would suffice. Pet.26,37.

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[18] Contrary to the Petition's contention, *see* Pet.31, in its brief below (at 58), the Times, like the Fourth Circuit, cited the quoted language from *Ryan* as one of a number of examples, derived from *St. Amant*, of the kinds of evidence that could support a finding of constitutional malice.

In addition, the Petition's recitation of the record evidence with respect to Kristof's state of mind, including evidence that the Fourth Circuit allegedly "ignored," is neither reliable nor complete. For one thing, it is undisputed that, when he wrote the columns, Kristof knew:

- At least five bio-weapons experts had identified Hatfill to the FBI as someone who should be investigated carefully (J.A.266-67,356-59,416-18);
- Several news organizations had reported that Hatfill had access to labs where anthrax was stored; had knowledge of how to weaponize anthrax; had lost his security clearance after failing a polygraph exam; and had access to a "remote location" where anthrax could be refined (J.A.265-69,410-35);
- The FBI and Rosenberg, the chair of a working group convened by the American Federation of Scientists, had both issued profiles of the mailer with many characteristics matching what Kristof knew about Hatfill (J.A.255-56,342-59); and
- Hatfill's own résumés claimed expertise in "dry" bio-warfare agents, tenure in government facilities where anthrax research was conducted, and many publications on bioterrorism, including anthrax (J.A.269-70,282,326-39,447-73).

For another, there is no evidence in the record that Kristof "fabricated" anything. The Petition relies on the alleged "fabrication" of four published statements to demonstrate that "Kristof either doubted the truth of his assertion that Hatfill was the anthrax murderer or recklessly made claims supporting that assertion." Pet.26-29. No amount of hyperbole can transform Kristof's newsgathering with respect to these statements, three of which were never alleged to be false in Hatfill's Complaint,[19] into clear and convincing evidence that, at the time he wrote his columns, Kristof "in fact entertained serious doubts," *St. Amant*, 390 U.S. at 731, about the truth of the only defamatory accusation Hatfill placed at issue – that "Kristof's columns falsely accused him of committing the anthrax murders," Pet.6.

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[19] These statements – concerning the "safe house," "alias," and "bloodhounds" – were first alleged to be false after discovery closed. *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993) (in Fourth Circuit, plaintiff may not "belatedly rely" on statements "not labeled as false in the complaint"); *Veilleux v. NBC*, 8 F. Supp. 2d 23, 35-36 (D. Me. 1998) (defamation plaintiff may not on summary judgment dispute "entire statements *not* alleged in the complaint," lest defendant be unfairly forced "to prepare a defense to virtually every statement made" in publication); *see generally Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (purpose of federal pleading rules is to "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"). This effort at sandbagging – not the adoption of a "rule" requiring "complete fabrication" – explains why the Fourth Circuit "did not address any of the evidence" on which the Petition now relies. Pet.29.

It is, for example, undisputed that Kristof was both told about Hatfill's access to the "isolated residence" by Rosenberg and read about it in other publications before referencing it – in the form of a question – in one of his columns. J.A.356-59,416-18,1768-72,1777-78,1793-97. It is equally undisputed that Cipro was discussed by Hatfill there and that he not only was taking it himself, but dispensed it to others from the trunk of his car. J.A. 542-58,745-47,1387,1628,1630-33,1644-50,1655.[20] It is also undisputed that the FBI said it used bloodhounds as Kristof described, J.A.172-73,241B-C,243-244, and that he read a lengthy article in *Newsweek* relating the same facts he repeated, J.A.269,442-46. *See also*

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[20] In the face of this undisputed evidence, the Petition's effort to equate Kristof's failure to locate the property's owner with the failure of the newspaper in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), to interview Patsy Stephens, the one person who could corroborate her sister's defamatory claims, is unpersuasive. *See* Pet.33. In *Harte-Hanks*, there was substantial evidence that Stephens' sister, the newspaper's *only* source, was known to be unreliable. 491 U.S. at 689 n.36. In stark contrast, Kristof read about the "isolated residence" in several reputable publications, did not know who owned the property, J.A.416-18,1768-72, and was told about it by Rosenberg, "an expert in the field of biological weapons [who] had been called upon by the FBI to discuss the anthrax investigation," App.25a. *See St. Amant*, 390 U.S. at 732 (for purposes of constitutional malice, a duty to investigate arises where there are obvious reasons to doubt source's credibility or source's information is inherently improbable). Nor does the relevant column "fabricate" an accusation that the isolated residence was a "safe house." Rather, it wondered *whether*, in the form of a *question*, the residence "*may be*" a "safe house." J.A.52 (emphasis added).

p. 12 *supra*. And, it is undisputed that Kristof's research assistant investigated the "alias" issue using electronic databases and assured Kristof, in writing, that Hatfill "definitely has at least one alias, the hatfield one, based on the ss# and address in Florida. this I am positive about." J.A.1938-39. *See* J.A.538 (Hatfill also used another alias).

Finally, despite the Petition's representation to the contrary, *see* Pet.27, Hatfill was unable to carry his burden of proving the material falsity of the published statement that he "failed three successive polygraph examinations." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).[21] His effort to do so consisted entirely of citation to his own press release that he "took one FBI polygraph examination and was *told* by the examiner that he passed." Pet.27 (emphasis added). Hatfill made no effort to secure from the FBI any evidence that would corroborate the truth of that statement, even though he presumably knows who gave him the polygraph exam he concedes he took

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[21] Although the Fourth Circuit did not reach the issue, the district court concluded that Hatfill had failed to carry his burden of proving the substantial falsity of *any* of the specific statements that allegedly contributed to the single defamatory meaning he attributed to the columns – including that Hatfill had "access to Fort Detrick labs where anthrax spores were kept;" "expertise in dry biological warfare agents;" and "access" to an "isolated residence." App.50a-53a (district court decision). The Petition's repeated assertions that such statements are "false," *see, e.g.*, Pet.6-7. cannot be squared with either that holding or the record evidence.

and where to go to obtain the actual results.[22] His own testimony about what the FBI allegedly said is inadmissible hearsay that "cannot be considered on a motion for summary judgment." *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *see also* FED. R. CIV. P. 56(e); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.19 (1970). On the other hand, the record contains significant, undisputed evidence that the FBI administered to Hatfill "*at least* one polygraph examination" that "involved more than one test sequence," J.A.215-16,954,1656, and that FBI records reference the "results" of a "second polygraph," J.A.224.[23]

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[22] The Petition's related contention that Kristof "fabricated" what the FBI told him about the polygraphs cannot be reconciled with his admission in his suit against the government that the FBI leaked to the media, in violation of the Privacy Act, the fact that he had "failed polygraphs." J.A.171.

[23] Hatfill argued below that the Times should not have secured summary judgment because it did not comply with a magistrate's order that it disclose the identities of two of the more than thirty sources on whom Kristof relied. Br.59. The district court rejected Hatfill's request for such a sanction, exercising its discretion to impose a different penalty that would "ameliorate th[e] prejudice" to Hatfill "without resorting to overly drastic measures." J.A.107. The district court's decision to permit the Times to seek summary judgment, provided it did not rely on its two confidential sources, was reviewable only for abuse of discretion. *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003). Hatfill does not now and did not in the Fourth Circuit contend that the district court acted arbitrarily, especially since his speculation in this Court about what he might have learned from these sources is inconsistent with his

Most importantly, the Fourth Circuit reasonably determined, based on its own "careful review of the record," App.24a, that none of the "evidence" on which the Petition relies, even if credited, can support the conclusion that the Times had serious doubts about the truth of the implication that Hatfill is the anthrax mailer, the only allegedly defamatory meaning that Hatfill attributed to the columns. App.23a. Put differently, even if a jury were to accept all of Hatfill's suggestions about additional steps Kristof *should have* taken before publication – investigating the isolated residence further, disclosing that the "alias" to which he referred was "Hatfield," being skeptical of the FBI's use of bloodhounds, or avoiding references to polygraphs, such a showing cannot, in the face of the "substantial [undisputed] evidence . . . that Kristof *actually believed* that Dr. Hatfill was the prime suspect," App.24a, reasonably be considered proof of "convincing clarity" that Kristof in fact entertained serious doubts about the truth of the implication that Hatfill perpetrated the anthrax attacks. *See* App.25a ("the evidence in this case, *'at best,'* reveals that

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concession elsewhere that the statements about which he complains were in fact leaked to the press by the FBI. J.A.171. *See Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (must be "cognizable prejudice" before unavailability of testimony from confidential sources can defeat summary judgment; "[m]ere speculation or conjecture about the fruits of such examination simply will not suffice"); *see also Hepps*, 475 U.S. at 779 (concluding that plaintiff's inability to secure testimony from newspaper's sources because of state shield law does not excuse plaintiff's failure to carry his burden of proving falsity).

Kristof 'did not know whether or not [Dr. Hatfill] was the anthrax mailer, but did believe that [Dr. Hatfill] was someone that [the] FBI should investigate more thoroughly'") (citation omitted).

If there were any doubt on this score, it was removed when Hatfill affirmatively asserted below, as an *undisputed material fact*, that "Kristof set out to prod the FBI because he believed Hatfill was the anthrax killer." J.A.1744. This is the antithesis of constitutional malice and amply supports the conclusion, reached by both the district court and a unanimous Court of Appeals, that "no reasonable jury could find that Kristof had a 'high degree of awareness' that Dr. Hatfill was *not* the anthrax mailer." App.24a (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

## CONCLUSION

The Petition should be denied.

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Respectfully submitted,

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